

# Tulsa Law Review

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Volume 19 | Issue 2

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Winter 1983

## State Regulation of Tender Offers Reexamined

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### Recommended Citation

Robin A. Rainey, *State Regulation of Tender Offers Reexamined*, 19 Tulsa L. J. 225 (2013).

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# NOTES AND COMMENTS

## STATE REGULATION OF TENDER OFFERS REEXAMINED

*There are only two ways for a company like ours to grow. By exploration success or acquisition. And very simply, you can make better use of your money now by playing the acquisition game.*<sup>1</sup>

—T. Boone Pickens

### I. INTRODUCTION

The Supreme Court's decision in *Edgar v. MITE*<sup>2</sup> heralds a significant shift toward uniform federal regulation of corporate takeover activity by means of the tender offer.<sup>3</sup> As a result of this decision,

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1. Cochran, *Texas Entrepreneur T. Boone Pickens Zealous in Risk-Taking*, Tulsa World, Dec. 26, 1982, at L3, col. 6. Pickens, President and Board Chairman of Mesa Petroleum, drew a lot of attention in a sardine-versus-whale takeover battle with Cities Service. Gulf Oil, in the role of a "white knight," came to Cities' rescue, only to later yield to Occidental Petroleum's successful takeover of Cities Service. However, Pickens said "the second place finish wasn't all that bad", since by losing to Occidental, Mesa got a \$40 million gain against a \$100 million loss. *Id.* at col. 1.

Gulf Oil was cast in the role of a "white knight" because the terms offered to Cities Service by Gulf were generally more favorable than those offered by Mesa. Mesa was viewed as a raider, one whose offer is not attractive to incumbent management. A raider usually looks for a target company with:

- (a) low price-earnings ratio and high book value in relation to market price . . . ;
- (b) a business that it knows and understands;
- (c) no concentrated blocks in inside hands . . . ; [and]
- (d) no antitrust or other regulatory problems.

LIPTON & STEINBERGER, TAKEOVERS AND FREEZEOUTS 46-47 (Supp. 1979).

2. 102 S. Ct. 1229 (1982).

3. "Tender offer" may be defined as an offer to acquire any equity security of a target company, if after acquisition thereof the offeror would be owner of a certain percentage or more of any class of securities of that company. *See, e.g.,* Oklahoma Take-Over Bid Act, OKLA. STAT. tit. 71, § 433(1) (1981) (offeror would become owner of 10% of any class of securities). A precise definition of a tender offer has proved to be somewhat elusive. The Williams Act, 15 U.S.C. § 78n(b) (1982), provides for federal regulation of tender offers but does not define the term. Its characteristics, however, were described in the House Report of the Committee on Interstate and Foreign Commerce as a "bid by an individual or group to buy shares of a company—usually at a price above the current market price." H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2811.

It is preferable to use a cash tender offer as opposed to an exchange tender offer if an offeror desires to acquire (a) a company that does not want to be acquired; (b) a company by an offer that a majority of the board of directors does not oppose but does not want to sponsor; (c) a company

parochial state interests no longer will be allowed to unduly burden the national securities market. The means by which a state can protect its interest in domestic corporations and resident shareholders, therefore, remain uncertain.

This Comment reviews the economic aspects of takeover regulations, presents the history of state and federal regulation, and explores the Tenth Circuit's application of the *MITE* analysis to the Oklahoma case, *Mesa Petroleum Co. v. Cities Service Co.*<sup>4</sup> Finally, this Comment examines the future of state regulation of bidder activity and target defense tactics in the takeover process and proposes methods of state control that remain viable in light of recent judicial holdings.

## II. ECONOMIC ASPECTS OF TENDER OFFERS

Traditionally less expensive and less time consuming than mergers or gradual market acquisitions, tender offers have become a popular means of acquiring control of publicly held corporations.<sup>5</sup> There is considerable disagreement, however, about the economic consequences

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before a third party can perfect a competing offer; and (d) a company in trouble when there is not sufficient time for a merger. LIPTON & STEINBERGER, *supra* note 1, at 3.

4. Nos., 82-1838; 82-2614; 82-2615; 83-1082 (10th Cir. Aug. 18, 1983) (available Sept. 1, 1983, on LEXIS, Fedsec library, Courts file).

5. See ARANOW, EINHORN, & BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL v (1977). The following factors have been suggested to explain the increasing popularity of tender offers:

- (1) Increased access to cash resulting from greater corporate liquidity and readily available credit;
- (2) Relatively low price-earnings and cash or quick assets ratios, as well as comparatively low book values;
- (3) Other means of obtaining control of the corporation, such as through proxy contests, require those seeking control to convince shareholders that they are better able to handle the affairs of the company than is the incumbent management, whereas tender offers appeal to shareholders on a strictly monetary basis;
- (4) The increasing respectability of tender offers as a takeover technique, along with greater sophistication and knowledge regarding the use of the tender offer.

Bunch, *Edgar v. MITE Corporation: A Proposed Analysis*, 17 TULSA L.J. 229, 233 n.37 (1981) (citations omitted); see also Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 n.2 (1976) (depressed market conditions suggested as accounting for the increase in takeover attempts, "since an offeror can pay a premium above the market price for share of a profitable company and still get a good return on its money"); LIPTON & STEINBERGER, *supra* note 1, at 39 (listing additional factors: (a) desire for diversification, particularly by companies with low return on investment, (b) fear of foreign investors, (c) surplus of dollars in foreign hands, and (d) acceptability of the aggressive takeover resulting from willingness of investment bankers to act for raiders and willingness of established companies to be raiders).

One study offers the following statistics regarding tender offers:

The tender offer as a vehicle for corporate control is a fierce weapon . . . [I]n just the last two years, at least 313 corporations have had to defend themselves against

of tender offers.<sup>6</sup> Some commentators believe that tender offers create substantial economic gains for both the bidders' and the target companies' shareholders and should be encouraged.<sup>7</sup> Implicit in this approach is the belief that the market is efficient and that economic benefit can be measured in terms of the increases in market value of the shares of the acquiring and the acquired corporations at the time of the acquisition.<sup>8</sup>

Believing that a company's market value is tied directly to the effectiveness of its management, these commentators argue that the efficient market discounts for suboptimal management. Corporate management is cast in the role of the shareholders' agent. The threat of an unfriendly takeover is perceived as a control over the agent's conduct that benefits the shareholders.<sup>9</sup> Accordingly, "a tender offer premium reflects the raider's judgment of the extent of the market discount for suboptimal management and the value of the target's business under the presumably more efficient and honest management of the raider . . . ."<sup>10</sup> Thus, target shareholders benefit either from the incentive for increased effectiveness of management that the threat of a tender offer provides or from the realization of the premium market value of their stock through the tender offer transaction. As a result of their bias toward the incentive that tender offers provide in an efficient

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another corporation's public attempts to take them over, and in some cases against attempts by more than one corporation. . . .

. . . Overall, the total percentage of unsuccessful tender offers during the last five years has remained relatively constant, ranging from 16 percent to 20.9 percent.

If one analyzes the entire period from 1956-1977, it can be said with assurance that if attacked, chances of successfully defeating the bid remain one in five, or 20 percent.

LIPTON & STEINBERGER, *supra* note 1, at 38 (quoting Austin, *Study Reveals Trends in Tactics, Premiums, Success Rates in Offers*, N.Y.L.J., June 12, 1978, at 25, col. 3).

6. ADVISORY COMMITTEE ON TENDER OFFERS, SEC REPORT OF RECOMMENDATIONS 7 (1983) [hereinafter cited as ADVISORY COMMITTEE REPORT]. Compare Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733 (1981) (arguing that takeovers are economically beneficial) with Lipton, *Takeover Bids in the Target's Boardroom; An Update After One Year*, 36 BUS. LAW. 1017 (1981) (arguing takeovers are not always economically beneficial) and LIPTON & STEINBERGER, *supra* note 1 (same).

7. ADVISORY COMMITTEE REPORT, *supra* note 6, at 7; Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J. LAW & ECON. 371, 381 (1980).

8. ADVISORY COMMITTEE REPORT, *supra* note 6, at 7; Jarrell & Bradley, *supra* note 7, at 381. According to empirical data, "in the 60 to 120 days during which a takeover transaction is considered the target company's shares rise an average of 30% while the bidder's shares increase an average of 3-4%." ADVISORY COMMITTEE REPORT, *supra* note 6, at 7 n.6; see also Bradley, *Interfirm Cash Tender Offers and the Market for Corporate Control*, 53 J. BUS. 345, 346 (1980) (acquired targets earned average premiums of 49% while acquiring firms earned average increase in market value of own stock of about 9%).

9. Easterbrook & Fischel, *supra* note 6, at 1735.

10. Lipton, *supra* note 6, at 1024 n.30.

marketplace, market theory advocates are generally opposed to government regulation of tender offers, arguing that the costs of regulation often exceed the benefits and that the real beneficiaries of regulation are the regulated firms rather than the shareholders.<sup>11</sup>

At the opposite end of the scale are those commentators who believe that hostile takeovers are socially and economically detrimental.<sup>12</sup> Arguments supporting this view include the claims that (1) the mere threat of a hostile takeover diverts management from long-range planning activity and the exercise of good business judgment;<sup>13</sup> (2) arbitrageurs,<sup>14</sup> and perhaps even tender offerors themselves,<sup>15</sup> are indifferent to the performance of the acquired company;<sup>16</sup> and (3) the process of tender bidding diverts resources from capital investment.<sup>17</sup> Commentators asserting these arguments take issue with the efficient market theory, declaring that:

[R]eadily available long-term credit, the advantages of borrowing in an inflationary period, the lack of return on investment in new facilities in many industries equivalent to the return from a takeover, and the "social acceptability" of takeovers starting with the 1973-4 decisions of major companies and leading investment bankers to engage in takeovers, have had much more to do with takeover activity than the efficient market theory or any effort by raiders to replace "suboptimal" management.<sup>18</sup>

Furthermore, these commentators believe that because of the negative social and economic effects attributable to the hostile tender offer, management's defense arsenal should be augmented by state regulatory statutes.<sup>19</sup>

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11. ADVISORY COMMITTEE REPORT, *supra* note 6, at 74.

12. *Id.* at 7.

13. *Id.* at 8; Easterbrook & Fischel, *supra* note 6, at 1743-44; Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 110 (1979).

14. Arbitrageurs are market professionals who purchase the shares of the target in the market in order to tender to the offeror, thereby narrowing the spread between the pre-offer market price and the offer price and providing market liquidity at or near the offer price for those who do not wish to wait for, or take the risk of, the consummation of the tender offer.

LIPTON & STEINBERGER, *supra* note 1, at 20.

15. It is questionable whether the tender offerors should be included in this criticism, "since the offerors [usually] plan to make a profit by holding the stock, perhaps merging with the target, and improving the target's performance in order to recoup the premium." Easterbrook & Fischel, *supra* note 6, at 1744 n.32.

16. Lipton, *supra* note 13, at 104, 113-15.

17. Lipton, *supra* note 6, at 1024 n.30.

18. *Id.*

19. Easterbrook & Fischel, *supra* note 6, at 1749.

A substantial majority of the Security and Exchange Commission's Advisory Committee on Tender Offers (Advisory Committee) believes that the economic data used in evaluating tender offer ramifications is problematic and does not support either of the extreme views on the economic effects of tender offers.<sup>20</sup> Advisory Committee members do not concur with commentators' claims that substantial economic benefits or detriments of takeover activities have been conclusively established. Some members express doubt that short-term market price increases support the conclusion that takeovers provide economic benefits, suggesting instead that the principal basis for settling the macro-economic issue should be a "long term evaluation of the economic soundness of the acquisition, as measured by the operations, conditions and productivity of the combined enterprises."<sup>21</sup>

The Advisory Committee believes that while some takeovers prove beneficial and others disappointing, the result is primarily attributable to the business judgment reflected in combining the specific enterprises and only secondarily traceable to the method of acquisition.<sup>22</sup> Accordingly, on the issue of government regulation of tender offers, the Committee recommends:

The purpose of the regulatory scheme should be neither to promote nor to deter takeovers; such transactions and related activities are a valid method of capital allocation, so long as they are conducted in accordance with the laws deemed necessary to protect the interests of shareholders and the integrity and efficiency of the capital markets.<sup>23</sup>

### III. REGULATION OF TENDER OFFERS

#### A. Federal Regulation

Neither the federal nor the state governments originally regulated tender offers. The provisions of the Securities Act of 1933<sup>24</sup> and the Securities Exchange Act of 1934<sup>25</sup> ('34 Act) required disclosures only from insiders trading in securities.<sup>26</sup> A tender offeror could demand

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20. ADVISORY COMMITTEE REPORT, *supra* note 6, at 8.

21. *Id.*

22. *Id.* at 9.

23. *Id.*

24. 15 U.S.C. §§ 77a-77yyy (1982).

25. *Id.* at §§ 78a-78lll.

26. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2814 (gap in securities laws did not afford shareholders protection from takeover bids); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62

that a tender of stock be irrevocable, could purchase first-tendered shares if the offer were oversubscribed, and could restrict the period during which the offer would be outstanding.<sup>27</sup> Such conditions induced investor panic. Shareholders were afraid they might miss the opportunity if they did not tender quickly.<sup>28</sup> Once they did tender, their shares were locked into the tender offer regardless of any subsequent changes in the terms of the offer or any second thoughts on the part of the shareholder.

Advocates of federal regulation were disturbed that the securities laws did not require an offeror to disclose its identity, the source of its funds, the identity of its associates, and most importantly, its intentions upon gaining control of the target corporation.<sup>29</sup> Therefore, in response to the fear generated by the increasing use of tender offers and the obvious disclosure gap,<sup>30</sup> Senator Williams introduced a proposal in 1965 to protect incumbent management from the "industrial sabotage" inflicted upon "proud old companies" by the corporate raider.<sup>31</sup> Congress adopted the resultant regulatory scheme known as the Williams Act as an amendment to the '34 Act.<sup>32</sup>

Although there has been debate concerning legislative intent in formulating the Williams Act, the weight of the evidence favors the

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CORNELL L. REV. 213, 214 (1977). For further discussion of the gaps in disclosure, see Sowards & Mofsky, *Corporate Take-over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499 (1967).

27. Bunch, *supra* note 5, at 234-35.

28. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812.

29. See S. REP. NO. 550, 90th Cong., 1st Sess. 2, 3 (1967).

30. See *MITE*, 102 S. Ct. at 2635-6; *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 22 (1977); S. REP. NO. 550, 90th Cong., 1st Sess. 2, 4 (1967).

31. 111 CONG. REC. 28,257 (1965). Introducing his proposal, Senator Williams stated, "In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves." 111 CONG. REC. 28,257 (1965).

Senator Williams' first proposal required that the offeror give a 20-day advance notice to the target corporation and the Securities and Exchange Commission (SEC) of his intent to make a tender offer. The proposal did not come out of committee. Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 688 (1975). After much discussion by the SEC, various national securities exchanges, the industry, and the academic community, the prevailing view supported the economic utility of tender offers in providing a mechanism to dispose of inefficient management as well as a means of obtaining an investment position in a company with relative ease. "Thus, the focus of the legislation changed from one of protecting incumbent management to one of providing 'full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.'" *Id.* (quoting 113 CONG. REC. 854-55 (1967) (remarks of Senator Williams)).

32. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

argument that it was designed to serve a dual purpose: (1) to provide protection for investors; and (2) to maintain a neutral balance between the tender offeror and the target company management.<sup>33</sup> The investor is afforded protection through the disclosure provisions of the Williams Act that require the tender offeror to reveal its background and identity; the source of funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company.<sup>34</sup>

The procedural requirements of the Williams Act serve to decrease investor panic by providing that all tendered shares must be purchased at the same price, and if an offeror's price is increased, those who have already tendered receive the benefit of the increase.<sup>35</sup> Moreover, the Act provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first ten days of the offer must be purchased on a pro rata basis.<sup>36</sup> The provisions of the Williams Act also diminish an investor's sense of being locked in by permitting shareholders to withdraw at any time until the expiration of seven days after copies of the offer are first published, sent or given to shareholders<sup>37</sup>—and if the offeror has not yet purchased the shares, at any time after sixty days from the commencement of the offer.<sup>38</sup>

If by means of the offer the offeror would acquire more than five

33. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, 4, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813; S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967); see Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U. L. REV. 767, 768 (1971); Langevoort, *supra* note 26, at 216-18; Moylan, *supra* note 31, at 688; Wilner & Landy, *supra* note 5, at 2; Comment, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes*, 8 FORDHAM URB. L.J. 913, 917-18 (1979-80); cf. *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 938 (S.D. Ohio 1979) (sole purpose of Williams Act was investor protection, and neutrality was merely an ancillary matter); Bunch, *supra* note 5, at 241-42 (Williams Act designed solely for investor protection); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 521-22 (1979) (same).

34. 15 U.S.C. § 78m(d)(1) (1982); 17 C.F.R. § 240.13d-101 (1982). The Williams Act also contains a general antifraud provision which has been interpreted to require disclosure of material information known to the offeror even if disclosure is not otherwise required. 15 U.S.C. § 78n(e) (1982), construed in *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F. 2d 247, 250 (2d Cir. 1973).

35. 15 U.S.C. § 78n(d)(7) (1982).

36. *Id.* at § 78n(d)(6).

37. *Id.* at § 78n(d)(5). SEC Rule 14(d)7 adds additional withdrawal rights: tendering shareholders may withdraw their shares up to 15 days after commencement of the date of the offer and up to 10 business days after the commencement of another bidder's tender offer. 17 C.F.R. § 240.14d-7 (1982).

38. 15 U.S.C. § 78n(d)(5) (1982).



percent of any class of equity security in the target company,<sup>39</sup> other provisions of the Williams Act demand that the offeror file its information statement with the Security and Exchange Commission (SEC) upon commencement of a tender offer. Concurrently, the offeror must publish or send similar information to the target company shareholders as well as to the target company itself.<sup>40</sup> While the requisites of the Act command the offeror to disclose relevant information to the target company and its shareholders, offeror ability to move secretly and announce its offers suddenly is preserved.<sup>41</sup> State statute requirements, on the other hand, frequently have been criticized for unduly burdening and delaying the offeror's right to secrecy and speed.

### B. State Regulation

The first state statute that regulated tender offers<sup>42</sup> was enacted four months prior to the enactment of the Williams Act. In general, the alleged purpose of state takeover statutes has been to protect target company shareholders by supplementing the protection provided by the Williams Act.<sup>43</sup> Additional interests propounded in support of state regulation of tender offers include local concern for the takeover bid's effect on (1) competition, employment, and union, political, and social matters; (2) the target's management, employees, customers, suppliers, and creditors; (3) local, versus centralized, control of industries; (4) limits on the debt-equity ratio of the offeror; and (5) the state's interest in regulating the internal affairs of domestic corporations.<sup>44</sup>

39. *Id.* at § 78n(d)(1); 17 C.F.R. § 240.14d-3 (1982). Equity securities are limited to those that (1) are registered pursuant to § 12 of the Exchange Act, 15 U.S.C. § 78i (1982); (2) would have been required to be so registered but for the insurance company equity security exemption of § 12(6)(2)(6) of the Exchange Act, *id.* at § 78i(g)(2)(G); or (3) are issued by a registered closed-end investment company under the Investment Company Act of 1940, *id.* at §§ 80a-1 to -52.

40. 15 U.S.C. § 78n(d)(1) (1982); 17 C.F.R. § 240.14d-3 (1982). For a detailed analysis of the Williams Act, see Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act*, 17 HARV. J. ON LEGIS. 409 (1980).

41. Speed and secrecy are the two major virtues of the tender offer. The greater the amount of time the target company has with respect to a given offer, the greater the number of options it can utilize to thwart the offer. See Wilner & Landy, *supra* note 5, at 14 & n.78. In a bid delayed by virtue of the Ohio State Takeover Statute, Microdot Inc. was able to arrange a friendly merger with a third party at \$21 per share while the tender offer of General Cable at \$17 per share was still in court. N.Y. Times, July 6, 1976, at L42, col. 4.

42. VA. CODE §§ 13.1-528 to -541 (1978) (effective Mar. 5, 1968).

43. See, e.g., ILL. REV. STAT., ch. 121½, § 137.51-1 (Supp. 1983-84) ("to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers . . . so as to strike a balance that does not favor either management of a target company or an offeror").

44. Justice Powell, concurring in part in *MITE*, supported the basic idea that state regulation

The state's statutory definition of the term "target company" primarily determines the state's jurisdiction over tender offer activity.<sup>45</sup> Some statutes<sup>46</sup> define target companies as only those companies incorporated in the state. Other statutes<sup>47</sup> are applicable to companies that are incorporated in the state and also do business or have substantial assets there. In some states,<sup>48</sup> the target company need not be incorporated in the state if the company has its principal place of business or substantial assets there.

A tender offer to a target company falling within the ambit of statutory jurisdiction triggers the requirement of compliance with each governing state's statutory provisions. Most state statutes require the filing of disclosure statements with the state securities commission before the offer can become effective.<sup>49</sup> Some statutory disclosure requirements are similar to those of the Williams Act, while others require more extensive disclosure.<sup>50</sup> Once the filings have been made, some statutes allow the state securities commissions to order a hearing

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is important when the consequences of a corporate takeover may be adverse to general public interest.

The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.

MITE, 102 S. Ct. at 2643; see Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 756 (1970).

45. See *infra* text accompanying notes 100-02; see also *State Take-Over Statutes and the Williams Act*, 32 BUS. LAW. 187, 194 (1976) (report of Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee) [hereinafter cited as Proxy Subcommittee].

46. See, e.g., DEL. CODE ANN. tit. 8, § 203 (Supp. 1982); NEV. REV. STAT. §§ 78.376-3778 (1979).

47. See, e.g., CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West 1981 & Supp. 1983-84); IND. CODE ANN. §§ 23-2-3.1-0.5 to -11 (Burns 1983); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1982); VA. CODE §§ 13.1-528 to -541 (1983).

48. ILL. ANN. STAT. ch. 121½, § 137.51-70 (Smith Hurd Supp. 1983-84); OKLA. STAT. tit. 71, § 433(4) (1981).

49. See, e.g., ARK. STAT. ANN. § 67-1264.2(5) (1980 & Supp. 1983) (information must be filed 10 days before the offer can become effective); HAWAII REV. STAT. § 417E-2(2) (1976) (5 days); NEV. REV. STAT. § 78.3771(1) (1979) (20 days); S.D. COMP. LAWS ANN. § 47-32-21 (Supp. 1982) (10 days). Under the Williams Act there is no precommencement notification requirement. Prior notification provides the target company with additional time to combat the offer.

50. See, e.g., GA. CODE ANN. § 22-1902 (1977 & Supp. 1982); ILL. ANN. STAT. ch. 121½ § 137.57E (Smith-Hurd 1983-84) (requiring that financial statements be filed); N.J. STAT. ANN. § 49:5-3 (West 1983-84) (requiring audited and unaudited financial information); OKLA. STAT. tit. 71, § 436 (1981) (requiring financial statement).

on the offer.<sup>51</sup> In a few cases, the hearings may be held at the request of the target company.<sup>52</sup> The purpose of the hearing may be to determine whether the offeror has failed to disclose sufficient information<sup>53</sup> or whether the offer is substantively fair.<sup>54</sup>

The state statutes prescribe various substantive requirements concerning the minimum offering period,<sup>55</sup> extension of this period after an amendment in the filing,<sup>56</sup> the withdrawal rights of shareholders,<sup>57</sup> and the pro rata take-up.<sup>58</sup> The statutes also contain enforcement provisions and remedies, generally empowering the state securities commission to issue cease and desist orders and injunctions.<sup>59</sup> Statutory violations may result in criminal prosecution, fines, or civil liability.<sup>60</sup>

#### IV. JUDICIAL REACTION TO STATE REGULATION OF TENDER OFFERS

State regulation of tender offers has generated substantial controversy and criticism. Between the time of the Fifth Circuit's decision in

51. See, e.g., ILL. ANN. STAT. ch. 121½, § 137.54E (Smith-Hurd 1983-84); OKLA. STAT. tit. 71, § 437(b) (1981).

52. See, e.g., ILL. ANN. STAT. ch. 121½, § 137.57A (Smith-Hurd 1983-84); KAN. STAT. ANN. § 17-1281 (1981); N.H. REV. STAT. ANN. § 421-A:5 (1983); VA. CODE § 13.1-531(a)(ii) (Supp. 1983).

53. See, e.g., OKLA. STAT. tit. 71, § 437(A)(2) (1981).

54. See, e.g., ILL. ANN. STAT. ch. 121½, § 137.57E (Smith-Hurd 1983-84).

55. See, e.g., COLO. REV. STAT. § 11-51.5-103(b) (Cum. Supp. 1982) (requires a 15 day minimum offering period); 70 PA. CONS. STAT. ANN. § 74(d) (Purdon 1983-84) (offer becomes effective in 20 days). The Williams Act does not specify any minimum period for which an offer must remain open. A majority of the Subcommittee on Proxy Solicitations and Tender Offers did not approve of the requirement that an offeror give prior notice. They preferred, if necessary as a compromise to accomplish the purpose of providing a longer period for review, to extend the minimum periods within which an offer, once made, must remain open. Proxy Subcommittee, *supra* note 45, at 195.

56. See, e.g., IOWA CODE ANN § 502.212(8)(b) (Cum. Supp. 1983-84) (14 days); OKLA. STAT. tit. 71, § 435(B) (1981) (5 days).

57. The Oklahoma statute did not include a provision covering withdrawal rights; therefore the Williams Act requirements would have governed shareholders' withdrawal rights. Cf. COLO. REV. STAT. § 11-51.5-103(c) (Cum. Supp. 1982) (under certain circumstances withdrawal within 15 days and at any time after 35 days from the date of invitation).

Certainly in the case of an offer for any and all shares, only the less sophisticated stockholders are likely to tender within the first seven days, or indeed at any time until shortly before the expiration of the offer. Institutional investors and other professionals tend to hold back, waiting to see if a better offer will be made. A requirement that a tendering stockholder be permitted to withdraw at any time within the first 15 days of an offer would put the ordinary stockholder on a more even footing.

Proxy Subcommittee, *supra* note 45, at 195.

58. "The Williams Act requires proration for all shares tendered within the first ten days of an offer; thereafter, the offeror can take up shares on a first come, first served basis." Proxy Subcommittee, *supra* note 45, at 196.

59. See, e.g., OKLA. STAT. tit. 71, § 448 (1981).

60. *Id.* at § 442.

*Great Western United Corp. v. Kidwell*<sup>61</sup> and the Supreme Court's decision in *Edgar v. MITE*,<sup>62</sup> at least thirteen courts found that a state takeover statute excessively burdened interstate commerce or was preempted by the Williams Act.<sup>63</sup> Courts in at least ten other cases recognized possible preemption or commerce clause problems with state takeover statutes but declined or were unable to rule on these issues because of the procedural posture of the cases at bar.<sup>64</sup> Two other decisions upheld state statutes as long as the statutes were interpreted and applied by the state securities administrators in a manner consistent with the Williams Act.<sup>65</sup> Decisions in two cases sustained the validity of the state statute.<sup>66</sup>

In general, the judicial approach to state regulation did not pro-

61. 577 F.2d 1256 (5th Cir. 1978), *rev'd*, 443 U.S. 173 (1979).

62. 102 S. Ct. 2629 (1982).

63. *See, e.g.*, *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980) (New Jersey statute); *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980) (Illinois statute); *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86 (N.D. Fla. 1981) (Florida statute); *Natomas Co. v. Bryan*, 512 F. Supp. 191 (D. Nev. 1981) (Nevada statute); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania statute); *Canadian Pac. Enter. (U.S.) Inc. v. Krouse*, 506 F. Supp. 1192 (S.D. Ohio 1981) (Ohio statute); *Hi-Shear Indus., Inc. v. Campbell*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804 (D.S.C. 1980) (South Carolina statute); *Brascan, Ltd. v. Lassiter*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. April 30, 1979) (Louisiana statute); *Dart Indus. Inc. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978) (Delaware statute); *Kelly v. Beta-X Corp.*, 302 N.W.2d 596 (Mich. Ct. App. 1981) (Michigan statute); *Eure v. Grand Metropolitan Ltd.*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,694 (N.C. Super. Ct. April 18, 1980) (North Carolina statute); *Joseph E. Seagram & Sons, Inc. v. Marley*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,246 (W.D. Okla. July 17, 1981) (Oklahoma statute).

64. *Crane Co. v. Harsco Corp.*, 509 F. Supp. 115 (D. Del. 1981) (Delaware statute); *Ex rel. Krouse v. SEC.* [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,688 (S.D. Ohio Oct. 15, 1980) (Ohio statute); *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 474 F. Supp. 1341 (E.D. Mo.), *aff'd* 611 F.2d 240 (8th Cir. 1979) (Missouri statute); *Tyco Labs., Inc. v. Connelly*, 473 F. Supp. 1157 (D. Mass. 1979) (Massachusetts statute); *UV Indus., Inc. v. Posner*, 466 F. Supp. 1251 (D. Me. 1979) (Maine statute); *S-G Sec., Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978) (Massachusetts statute); *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981) (North Carolina statute); *GM Sub Corp. v. Liggett Group Inc.*, 415 A.2d 473 (Del. 1980) (Delaware statute); *Unitrode Corp. v. Dynamics Corp. of Am.*, 399 N.E.2d 5 (Mass. 1980) (Massachusetts statute); *UV Indus., Inc. v. Sharon Steel Corp.*, [1978-81 Transfer Binder] BLUE SKY L. REP. (CCH) ¶ 71,466 (N.Y. Sup. Ct. Feb. 28, 1979) (New York statute).

65. *Hi-Shear Indus., Inc. v. Neiditz*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,805 (D. Conn. 1980) (Connecticut statute will not be invalidated on preemption or commerce clause grounds unless state administrator fails to exercise his statutory discretion to apply the statute's waiting period and hearing and withdrawal provisions in such a way as to avoid conflicting with the Williams Act and impermissibly burdening interstate commerce); *Sun Life Group, Inc. v. Standard Life Ins. Co.*, [1979-80 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314 (S.D. Ind. Mar. 12, 1980) (no conflict with Rule 14d-2(b) insofar as the state administrator construes the Indiana Insurance Company Holding Act as permitting a tender offer to commence prior to expiration of the 30-day statutory waiting period so long as the offer is expressly conditioned upon approval by the administrator).

66. *City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979) (this decision with respect to Ohio statute antedated adoption of Rule 14d-2(b); the subsequently adopted rule led to

vide a precise or consistent framework for analysis of the issue.<sup>67</sup> The Supreme Court's 1982 decision in *MITE*, however, settled at least one issue raised by state statutory requirements by holding that the Illinois Business Takeover Act was unconstitutional on commerce clause grounds.<sup>68</sup>

#### A. *The Supreme Court Decision: Edgar v. MITE*

Illinois enacted the Illinois Business Takeover Act (Illinois Act)<sup>69</sup> to govern the substantive and procedural aspects of the tender offer process. In contravention of the Illinois Act, MITE Corporation failed to file the required disclosures with the Illinois Secretary of State in preparation for a tender offer to an Illinois corporation; however, MITE complied fully with the federal disclosure requirements of the Williams Act.<sup>70</sup> When the Secretary of State of Illinois and the target company notified MITE of their intent to invoke the Illinois Act as a block to the proposed offer, MITE initiated a declaratory judgment action in federal court asking the court to declare the Illinois Act unconstitutional.<sup>71</sup> Thereafter, MITE published its tender offer. The district court found that the Illinois Act impermissibly burdened interstate commerce,<sup>72</sup> and the Court of Appeals for the Seventh Circuit affirmed.<sup>73</sup> James Edgar, Secretary of State of Illinois charged with administration and enforcement of the Illinois Act, appealed to the Supreme Court.

The *MITE* decision is not a model of judicial unanimity. Five justices<sup>74</sup> held the Illinois Act to be unconstitutional under a commerce clause analysis based on the balancing test adopted by the Court in *Pike v. Bruce Church, Inc.*<sup>75</sup> Under that test, a state statute that indi-

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holding in *Canadian Pac. Enter. (U.S.) Inc. v. Krouse*, 506 F. Supp. 1192 (S.D. Ohio 1981) that prenotification waiting period was preempted).

67. Sargent, *On the Validity of State Takeover Regulations: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 693 (1981).

68. 102 S. Ct. 2629 (1982).

69. ILL. REV. STAT., ch. 121½, §§ 137.51-.69 (Supp. 1983-84).

70. The Williams Act requires an offeror to file a Schedule 14D-1 with the SEC before commencing an offer. This schedule provides material financial information about the offer. When the offer commences, the offeror must furnish the information contained in the schedule to the target and its shareholders. 15 U.S.C. § 78n(d)(1) (1982).

71. 102 S. Ct. at 2632.

72. *MITE Corp. v. Dixon*, No. 79 C 200 (N.D. Ill. Feb. 9, 1979).

73. *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980).

74. Justice White was joined in his opinion by Chief Justice Burger, Justices Powell, Stevens, and O'Connor. 102 S. Ct. at 2633.

75. 397 U.S. 137 (1970). Under the test articulated by the Supreme Court in *Pike v. Bruce Church, Inc.*, a state statute would be upheld if it "regulates evenhandedly to effectuate a legiti-

rectly regulates interstate commerce will be held unconstitutional if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>76</sup> Through its takeover statute, Illinois attempted to assume the power to govern tender offers nationwide.<sup>77</sup> Conceivably, the statute could have applied to regulate a tender offer affecting many states. The Court stated that the putative local benefits of seeking to protect resident shareholders and regulate the internal affairs of domestic corporations were "insufficient to outweigh the burdens" the Illinois Act imposed on interstate commerce.<sup>78</sup> In the Court's opinion, these interests did not outweigh the deprivation of a shareholder's opportunity to sell his shares at a premium, the interference with the reallocation of economic resources to their highest-valued use, and the reduction of the incentive for incumbent management to perform well.<sup>79</sup>

The Court clearly stated that a "state has no legitimate interest in protecting non-resident shareholders."<sup>80</sup> Moreover, the Court was unconvinced by the specious argument that the state statute substantially enhanced the resident shareholders' position, since the Williams Act provided the same substantive protections.<sup>81</sup> Furthermore, the Court rejected the contention that the Illinois Act was simply an expression of the traditional state police power over internal corporate affairs.<sup>82</sup> "Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."<sup>83</sup> This justification of the Illinois Act is even more suspect in light of its extraterritorial effect.

Justice White's analysis discussed the issue of federal preemption of the Illinois Act under the supremacy clause and outlined the argu-

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mate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

76. *Id.*

77. See *infra* text accompanying notes 101-02.

78. 102 S. Ct. at 2642; see also *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) (permitting the individual states to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the clause protects); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928) (Louisiana may not prohibit interstate movement of raw shrimp to favor local packing industries).

79. 102 S. Ct. at 2642. The Supreme Court seems to follow the efficient market theory. See *supra* text accompanying notes 7-11.

80. 102 S. Ct. at 2642.

81. *Id.*

82. *Id.* at 2642-43.

83. *Id.* at 2643.

ments for holding the Illinois Act to be in direct violation of the commerce clause. However, Justice White was unable to secure a majority of the Court in favor of invalidating the Illinois Act on either of these grounds. On the other hand, neither were these grounds rejected by a majority of the Court: three justices determined that the case was moot and were unwilling to reach the merits.<sup>84</sup> Both the supremacy clause and the commerce clause, therefore, remain potentially applicable in judicial evaluation of other state takeover statutes.

Critical to any future determination that state regulation of tender offers is preempted by the Williams Act will be the question of whether that state's regulation "stands as an obstacle to the accomplishment and execution of the full purpose and objectives"<sup>85</sup> of the Williams Act. Notwithstanding the Court's prior opinion in *Piper v. Chris-Craft Industries, Inc.*<sup>86</sup> that the sole congressional purpose behind the Williams Act was shareholder protection, in *MITE* the Court agreed with the court of appeals<sup>87</sup> that by enacting the Williams Act, "Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice."<sup>88</sup>

In Justice White's opinion, the Illinois Act upset the balance that Congress sought to achieve by delaying the tender offer process to the advantage of incumbent management.<sup>89</sup> Moreover, he believed that

84. *Id.* at 2648-54. For a thorough discussion of the *MITE* case, see *The Supreme Court 1981 Term*, 96 HARV. L. REV. 4, 62-71 (1982); Note, *State Regulation of Tender Offers for Insurance Companies After Edgar v. MITE*, 51 FORDHAM L. REV. 943 (1983); Note, *Edgar v. MITE Corp: The Death Knell for the Indiana Takeover Offers Act*, 16 IND. L. REV. 517 (1983) [hereinafter cited as *The Death Knell*].

85. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

86. 430 U.S. 1 (1977).

87. 633 F.2d 486 (7th Cir. 1980).

88. 102 S. Ct. at 2636-37 (citing *MITE*, 633 F.2d at 496).

89. *Id.* at 2638-39. "In enacting the Williams Act, Congress itself 'recognized that delay can seriously impede a tender offer' and sought to avoid it." *Id.* (quoting *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1277 (5th Cir. 1978)). Delay is "the most potent weapon in a tender offer fight." *MITE*, 102 S. Ct. at 2638 n.12; see also *Wilner & Landy, supra* note 5, at 9-10. According to the SEC, delay enables a target company to:

(1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; (7) institute litigation challenging the tender offer.

*Mite*, 102 S. Ct. at 2639 n.13; see *Flom, The Role of the Takeover in the American Economy*, 32 BUS. LAW. 1297, 1299 (1977). "It is possible that the prospect of delay, together with the opportunity this gives incumbent management to raise defenses, might convince a potential offeror to refrain from making a tender offer, thereby depriving shareholders of the opportunity to tender their stock at a premium." Note, *supra* note 33, at 523. Any such proposition is at best specula-

because the Illinois Secretary of State could stop offers he deemed unfair, shareholder freedom to make investment decisions was thwarted.<sup>90</sup>

Justices Stevens and Powell refused to join the preemption discussion. Justice Stevens stated in his concurrence that he was not persuaded that the decision of Congress to follow a policy of neutrality in the Williams Act was tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management.<sup>91</sup> Similarly, Justice Powell stated, "[T]he Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management."<sup>92</sup>

The Court recognized only the protection of resident shareholders as a legitimate objective of state regulation.<sup>93</sup> Even though *MITE* lends support to states seeking to justify local regulation on this basis, the reasoning of the Court suggests that disclosure or delay requirements more stringent than those of the Williams Act may not benefit, and may even harm, shareholders.<sup>94</sup> Additionally, obligations under a state statute that conflict with the Williams Act could be seen as burdening interstate commerce.<sup>95</sup> Thus, the failure of the Court to rule on the questions of preemption and direct violation of the commerce clause leaves states without a clear guide for enactment of valid takeover statutes.

As a result of the *MITE* decision, several state takeover statutes have been held unconstitutional.<sup>96</sup> The Tenth Circuit decision<sup>97</sup> that found the Oklahoma Take-Over Bid Act<sup>98</sup> unconstitutional is represen-

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tative, since despite the growing number of state statutes, the use of the tender offer device has "virtually exploded." *Id.* Conversely, the main effect of delay may be argued to be a benefit to the investor. A longer offering period would reduce panic and pressure on the investors to tender their shares immediately. Furthermore, the longer period would permit the formation of an auction market for the target's stock and thus allow the investors to benefit from a higher price and increased market for their securities. *Id.* at 524.

90. 102 S. Ct. at 2639.

91. *Id.* at 2644.

92. *Id.* at 2643.

93. *Id.* at 2642.

94. *Id.*

95. *The Supreme Court 1981 Term, supra* note 84, at 67.

96. *See, e.g.,* *Telvest v. Bradshaw*, 697 F.2d 576, 579-82 (4th Cir. 1983) (Virginia); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565 (6th Cir. 1982) (Michigan); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1133 (8th Cir. 1982) (Missouri).

97. Nos. 82-1838; 82-2614; 82-2615; 83-1082 (10th Cir. Aug. 18, 1983) (available Sept. 1, 1983, on LEXIS, Fedsec library, Courts file).

98. OKLA. STAT. tit. 71, §§ 431-450 (1981).



tative of this result.

### B. *The Oklahoma Statute*

The Oklahoma Take-Over Bid Act (Oklahoma Act) was adopted in 1981 for the purpose of providing "full, fair and effective disclosure of all material information concerning takeover bids to shareholders of target companies so that the opportunity of each shareholder to make an informed investment decision may be secured."<sup>99</sup> As a result of the definition of "target company" under the Oklahoma Act, the provisions of the Oklahoma statute would govern any offer to any company that:

- a. is organized under the laws of [Oklahoma], or
- b. has substantial assets and its principal place of business within [Oklahoma], or
- c. has substantial assets and significant operations within [Oklahoma], or
- d. has security holders resident in [Oklahoma] who own beneficially or of record an aggregate of ten percent (10%) or more of any class of equity securities which are or are about to be subject to a take-over bid.<sup>100</sup>

In *MITE*, the Court's finding that the Illinois Act was unconstitutional turned on the influence of the statute on the nationwide securities market. This interstate influence was the result of the Illinois Act's definition of "target company."<sup>101</sup> Under Illinois law, a tender offeror could be prevented from making an offer and concluding the transaction not only with resident shareholders, but also with shareholders living in other states and having no connection with Illinois.<sup>102</sup> A comparison of the Illinois and Oklahoma statutes reveals that the coverage of the Oklahoma Act was even broader than the reach of the Illinois Act, because simple incorporation of the target under the laws of Oklahoma, without more, would have been sufficient to invoke the applicability of the Oklahoma Act in any takeover activity.

With respect to the required information that an offeror had to disclose to a target company, the Oklahoma Act required that upon the

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99. *Id.* at § 432.

100. *Id.* at § 433(4).

101. ILL. REV. STAT., ch. 121½, § 137.52-10 (West Supp. 1983-84).

102. On its face, the Illinois Act applied even in instances when all of the shareholders were non-residents of Illinois, since the Act applied to every tender offer for a corporation meeting two of the following conditions: the corporation had its principal executive office in Illinois, was organized under Illinois laws, or had at least 10% of its stated capital and paid-in surplus represented in Illinois. *Id.*

filing of the required disclosures with the SEC, or not less than five days prior to the commencement of the tender offer, an offeror had to file an information statement with the administrator of the Oklahoma Securities Commission and with the target company.<sup>103</sup> Once notification of intent to make a tender offer was presented, the statute provided for a hearing concerning that offer.

Pursuant to the Oklahoma Act, the Administrator of the Oklahoma Securities Commission could call a hearing to determine whether a tender offer failed to make "full, fair and effective disclosure to offerees of all information material to a decision to accept or reject the offer."<sup>104</sup> Within twenty days, or for such longer period as the offeror might request for good cause, the Administrator had to conduct the hearing and enter a final order.<sup>105</sup> If the Administrator found that disclosure was inadequate, this would halt the offer until such time as disclosure was adequate. Moreover, following such a hearing, any party could file a petition for rehearing.<sup>106</sup>

Substantively, the various provisions of the Illinois and Oklahoma Acts were very similar. This similarity allowed the Court of Appeals for the Tenth Circuit to utilize the reasoning of the Supreme Court in *MITE* to hold the Oklahoma Act unconstitutional in *Mesa Petroleum Co. v. Cities Service Co.*<sup>107</sup>

#### C. *Mesa Petroleum Co. v. Cities Service Co.*

The Deputy Administrator of the Oklahoma Department of Securities entered an appeal in the District Court for the Western District of Oklahoma<sup>108</sup> from that court's injunctions against enforcement of the Oklahoma Act. The injunctions were issued in favor of appellees *Mesa Petroleum* and *Occidental Petroleum*.<sup>109</sup> Each of these corporations made tender offers to *Cities Service Company* that were subject to the requirements of the Oklahoma Act. The Oklahoma district court held that the putative local benefits were clearly outweighed by the

103. OKLA. STAT. tit. 71, § 435 (1981).

104. *Id.* at § 437(A)(2)(b).

105. *Id.* at § 437(B).

106. *Id.* at § 437(C).

107. Nos. 82-1838; 82-2614; 82-2615; 83-1082 (10th Cir. Aug. 18, 1983) (available Sept. 1, 1983, on LEXIS, Fedsec library, Courts file).

108. *Id.*

109. *Occidental Petroleum Corp. v. Cities Serv. Co.*, [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 (W.D. Okla. Dec. 20, 1982); *Mesa Petroleum Co. v. Cities Serv. Co.*, [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,064 (W.D. Okla. Dec. 21, 1982).

burden on interstate commerce.<sup>110</sup> Specifically, the court stated that the disclosure, nondiscrimination, and proration provisions of the Oklahoma Act mirrored the Williams Act, except for additional information that the Administrator might require at his discretion.<sup>111</sup> Thus, the benefits of the Oklahoma Act with respect to shareholders were deemed "purely speculative."<sup>112</sup> Moreover, the court found that even if the Oklahoma Act was construed to apply only to Oklahoma residents, it still clearly would be an excessive burden on interstate commerce.<sup>113</sup>

Not only did the court find that the Oklahoma Act was unconstitutional, but it also asserted that the Act denied an offeror his right under federal securities laws to acquire stock in a nationwide tender offer. The denial of such a right was said to be "an irreparable loss which [could not] be compensated in money damages."<sup>114</sup> Regarding the Oklahoma Act, the district court said that the offeror was under a "Sword of Damocles" that might or might not fall at the Administrator's discretion.<sup>115</sup>

Acting upon the appeal by the Oklahoma Administrator, the Tenth Circuit affirmed the district court ruling striking down the Oklahoma Act because, like the Illinois Act, the statute violated the commerce clause of the U.S. Constitution.<sup>116</sup> The Administrator of the Oklahoma Department of Securities argued that, unlike the Illinois Act, the Oklahoma Act (1) did not necessarily require a pre-offer filing, at least for those offers subject to the filing requirement of the Williams Act; (2) required that any hearing ordered by the Administrator be concluded within twenty days of the initial filing; and (3) allowed only the Administrator, not the target company, to demand a hearing.<sup>117</sup> The court of appeals found that these differences fell within Judge Learned Hand's category of "distinctions without a difference."<sup>118</sup> The essential point, the court said, was "bellweather clear: under the Oklahoma Act

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110. *Occidental*, [1982-83 Transfer Binder] FED. SEC. L. REP., at 95,043; *Mesa*, [1982-83 Transfer Binder] FED. SEC. L. REP., at 95,049.

111. OKLA. STAT. tit. 71, §§ 435(C), 436, 439-441 (1981).

112. *Occidental*, [1982-83 Transfer Binder] FED. SEC. L. REP., at 95,043; *Mesa*, [1982-83 Transfer Binder] FED. SEC. L. REP., at 95,049.

113. *Id.*

114. *Id.*

115. *Occidental*, [1982-83 Transfer Binder] FED. SEC. L. REP., at 95,042; *Mesa*, [1982-83 Transfer Binder] FED. SEC. L. REP., at 95,048.

116. *Mesa*, Nos. 82-1838; 82-2614; 82-2615; 83-1082 (10th Cir. Aug. 18, 1983) (available Sept. 1, 1983, on LEXIS, Fedsec library, Courts file).

117. *Id.*

118. *Id.*

the Administrator may halt, indefinitely, a nationwide tender if he finds the disclosure to be 'inadequate' by some unspecified standard."<sup>119</sup> The fatal flaw of the Oklahoma Act, like the Illinois Act, was the inclusion of a "provision which allowed the state, under the banner of protection for its citizens, effectively to block a nationwide tender offer."<sup>120</sup>

## V. THE FUTURE OF STATE REGULATION OF TENDER OFFERS

The principal complaint concerning state regulation of tender offers has been that such regulation discourages<sup>121</sup> and delays<sup>122</sup> the tender offer process.<sup>123</sup> The fatal constitutional flaw within state statutes, however, has been their burdensome effect upon transactions that take place in the national securities market. Although it is certain that statutes that violate the commerce clause will be held invalid, the type of regulatory scheme that would be valid remains uncertain. Viable future state regulation of tender offers should neither discourage, delay, nor burden the tender offer process on a national level, nor sacrifice traditional state interests in domestic corporations and state residents.

In adopting the Williams Act, Congress did not amend section 28(a) of the '34 Act, which in pertinent part provides: "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security of any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."<sup>124</sup> In choosing not to amend, Congress did not explicitly prohibit state regulation of takeovers. Supporters of state regulation of takeovers have even suggested that section 28(a) was plainly intended to protect, rather than limit, state authority.<sup>125</sup> Nevertheless, in order to avoid friction be-

119. *Id.*

120. *Id.*

121. For a statistical summary of the effects of the Williams Act on the number of tender offers, see ADVISORY COMMITTEE REPORT, *supra* note 6, at 11 n.9.

122. See *supra* note 89.

123. See *supra* text accompanying notes 7-11.

124. 15 U.S.C. § 78bb(a) (1982).

125. It has been argued, however, that this savings clause is inapplicable to the regulation of tender offers because section 28 was part of the original '34 Act and was designed to protect state blue sky laws, not takeover statutes. Furthermore, some commentators suggest the state laws are analagous to corporate law rather than securities law; therefore, it is too mechanical to suggest that the savings clause was intended to apply to state takeover legislation. Langevoort, *supra* note 26, at 247. Some commentators have argued that the Williams Act enunciates a national policy so pervasive that congressional intent may be inferred to exclude state regulation. Wilner & Landy, *supra* note 5, at 25, 30 (certain provisions of the Williams Act have such a substantive effect on

tween the substantive and procedural requisites of the state and federal regulatory schemes, it is important that "the appropriate balance between the overlapping regulatory structures" be achieved.<sup>126</sup>

The *MITE* and *Mesa* decisions, along with others adopting their reasoning,<sup>127</sup> suggest that any state regulation of bidder activity that potentially discourages or delays tender offers will be found to impose substantial burdens on interstate commerce. Because local businesses have little to gain by encouraging the demise of takeover statutes, the impetus to strike down those statutes must come from potential offerors or from an appropriate governmental body. Potential offerors, however, may have little or no voice in the political process of the state that is attempting to impose its statutory requirements on the offeror. Thus, the political check on unduly burdensome regulation is effectively left to Congress, the state legislatures, the SEC, or the courts.

Because Justice White's preemption analysis in *MITE* did not receive the support of the Court,<sup>128</sup> the lower courts are left to apply *MITE* to various state statutes on a case-by-case basis. Clearly, the Court has rejected any extraterritorial effect of the various state statutes as unconstitutional, and it also appears to have rejected any assertion that the state statutes enhance the protections the Williams Act offers within the state's borders.<sup>129</sup> Using the same analysis, it would seem equally clear that the intention of the state statutes could only be the insulation of local target companies from "possible liquidation or relocation of corporate assets and the consequent loss of local revenue and employment."<sup>130</sup>

Given such an obvious conflict between the state statutes and the Williams Act, "the Court should have nullified the Illinois Act on supremacy clause grounds as well as on the commerce clause grounds."<sup>131</sup> Because the Court did not hold on the preemption issue, it did not expressly negate the possibility of state regulation of interstate tender offers.<sup>132</sup> Therefore, it is up to other governing bodies to eliminate the investing public's unnecessary confusion, to obviate bur-

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tender offers that Congress' delineation of one method was intended not as a minimum standard but as the standard to be applied in every state).

126. ADVISORY COMMITTEE REPORT, *supra* note 6, at 17.

127. *See supra* note 96.

128. *See supra* text accompanying note 84.

129. *MITE*, 102 S. Ct. at 2642-43.

130. Note, *supra* note 33, at 528.

131. *The Death Knell*, *supra* note 84, at 525.

132. 102 S. Ct. at 2640.

densome litigation, and to prevent countless hours of debate within state legislatures.

Troubled by the reluctance of courts to find state takeover statutes unconstitutional based on the present federal regulatory scheme, the SEC has designed rules to conflict with state provisions and has announced that "the rules effectively do away with state statutes."<sup>133</sup> Bemoaning the failure of the courts to find that the Williams Act preempts state law, the SEC has pressed for an amendment to the '34 Act to specifically preempt state takeover statutes.<sup>134</sup> Because action by the SEC "could be characterized as a use of rulemaking power to gain exclusive regulatory authority in derogation of congressional intent,"<sup>135</sup> it would be preferable for Congress to resolve the lingering uncertainties.<sup>136</sup> Congress should give careful scrutiny to the advantages and disadvantages of permitting state regulation with an eye toward balancing state and national interests in takeover regulation.<sup>137</sup>

The SEC Advisory Committee on Tender Offers has recommended that state regulation of takeovers be confined to local companies.<sup>138</sup> It has suggested that the definition of "local companies" include only those companies with more than fifty percent of their voting shares held within the state of incorporation, and any company included within the definition should not be listed on a national securities exchange.<sup>139</sup> Furthermore, the aggregate market value of the voting stock held by non-affiliated stockholders should be twenty million dollars or less.<sup>140</sup> Finally, the annual trading volume of such stock should be less than one million shares.<sup>141</sup> Although the more-than-fifty-percent requirement would eliminate the problem of multiple state takeover statutes applying to any one offer, the applicability of such a statute would be limited; in actuality, the number of tender offers for such local companies might be negligible.

Because of the extreme limitations imposed upon state regulation by the Constitution, the SEC, and the courts, it is clear that bidders'

133. McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295, 311 (1981).

134. *Id.* at 312.

135. *Id.*

136. *Id.* at 313; see also *The Supreme Court 1981 Term*, *supra* note 84, at 71 (supporting congressional, rather than SEC, preemption).

137. McCauliff, *supra* note 133, at 313; *The Supreme Court 1981 Term*, *supra* note 84, at 71.

138. ADVISORY COMMITTEE REPORT, *supra* note 6, at 17.

139. *Id.* at n.17.

140. *Id.*

141. *Id.*

activities are, and will continue to be, governed largely by federal law. The response of the target company to the takeover bid, however, well may be subject to state statutory and common law.<sup>142</sup>

Espousing a balance between minimal preemption of traditional state corporate law and maintenance of the integrity of the national securities market, the Advisory Committee has recommended a system of state regulation of domestic corporations' internal affairs and state-by-state application of the business judgment rule as a tender offer control mechanism.<sup>143</sup> "Broadly speaking, the Committee believes that the business judgment rule should be the principal governor of decisions made by corporate management including decisions that may alter the likelihood of a takeover."<sup>144</sup> Nonetheless, in keeping with the current judicial trend, the Advisory Committee condemned support of any mechanism which interferes with takeovers in the national marketplace, including "the use of charter and by-law provisions that erect high barriers to change of control and thus operate against the interests of shareholders and the national marketplace."<sup>145</sup>

Defensive plays are being studied and adopted by hundreds of companies.<sup>146</sup> These defenses include such tactics as staggered directorships,<sup>147</sup> fair price amendments,<sup>148</sup> golden parachute arrangements,<sup>149</sup> employment of Wall Street takeover and proxy-solicitation firms for special studies and projects,<sup>150</sup> supermajority provisions,<sup>151</sup>

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142. *Id.* at 34.

143. *Id.*

144. *Id.*

145. *Id.* at 36.

146. Metz, *Foiling Suitors, To Forestall Takeovers, Many Concerns Move to Shore Up Defenses*, Wall St. J., Mar. 18, 1983, at 1, col. 8.

147. Staggered elections make it difficult to change the target's board of directors. LIPTON & STEINBERGER, *supra* note 1, at 62.

148. "Fair price" amendments are attempts to ensure that, after a partial takeover, the remaining shareholders get a good price for their stock. Metz, *supra* note 146.

149. "Golden parachute" arrangements are "[a]rrangements that provide change of control related compensation to company managers or employees." ADVISORY COMMITTEE REPORT, *supra* note 6, at 38.

Justifications articulated for contracts that become operative only in the event of a change of control are based on the issuer's interests in attracting and retaining high quality management, in keeping management's attention on running the business, and in aligning management's interests more closely with those of shareholders when an offer for the company is at hand.

*Id.* at 39.

150. Metz, *supra* note 146.

151. "Supermajority provisions" are charter provisions that require more than the statutorily imposed minimum vote requirement to accomplish a merger. ADVISORY COMMITTEE REPORT, *supra* note 6, at 38.

disenfranchisement,<sup>152</sup> standstill agreements,<sup>153</sup> self tenders,<sup>154</sup> countertenders,<sup>155</sup> stock and asset transactions,<sup>156</sup> third-party asset sales,<sup>157</sup> use of employee benefit plans,<sup>158</sup> block repurchases at a premium,<sup>159</sup> "stock-watches",<sup>160</sup> and acquisitions creating antitrust impediments to the takeover.<sup>161</sup> These defensive ploys, however, may be limited by state statute.

The Advisory Committee considered protective charter amendments<sup>162</sup> appropriate when adopted with full disclosure of their effects and ratified regularly.<sup>163</sup> Protective charter amendments adopted after the commencement of a takeover, however, were believed to be inappropriate. The market then has no chance to assimilate the information into the price of the company's stock and offerors lack the opportunity to reflect the consequences of such avoidance mechanisms in their offers. If shareholders are involved in adopting the provisions,

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152. "Charter provisions (other than cumulative voting and class voting) that abandon the one-share, one-vote rule based on the concentration of ownership within a class (e.g., formulas diluting voting strength of 10% shareholders, and 'majority of the disinterested shareholders' approval requirements)." *Id.*

153. Standstill agreements are "[c]urrent agreements with remaining lives longer than one year that restrict or prohibit purchases or sales of the company's stock by a party to the agreement." *Id.*

154. "The target may seek to repurchase its own shares. This tactic will serve to distribute 'unwanted' cash and reduce the 'float' (shares held by shareholders most likely to accept a tender offer)." FLEISCHER, *TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING* 149 (1979).

155. Countertenders, frequently called the "Pac-Man defense", occur when the target company makes a tender offer for the securities of the original bidder. *Coming to terms with takeover lingo*, *Christian Sci. Monitor*, July 12, 1983, at 11, col. 1.

156. "Arrangements or options to sell stock or assets to a preferred acquiror (generally referred to as 'leg-ups' or 'lock-ups')." ADVISORY COMMITTEE REPORT, *supra* note 6, at 44. These arrangements often are necessary to induce a takeover contest among bidders. *Id.*

157. Third-party asset sales are the sales of significant assets by a target company during the course of a tender offer. *Id.* at 45.

158. Target companies may attempt to use an employee benefit plan to thwart a takeover bid by (1) instructing the retirement plan managers not to tender company shares held by the plan to an unapproved bidder, and (2) instructing the plan managers to purchase company stock with a view to defeating a hostile tender offer. *Id.* at 45.

159. Popularly denominated "greenmail," this tactic involves the "purchase of a substantial block of a target company's stock by an unfriendly suitor with the primary purpose of coercing the target company into repurchasing the block at a premium over the amount paid by the suitor." *Christian Sci. Monitor*, *supra* note 155.

160. "Stock watches" are early-warning ploys, wherein a target makes it a "personal assignment to find out who's behind every trade" that involves more than a certain percentage of stock. Metz, *supra* note 146, at p. 15, col. 1.

161. "Once the identity of the bidder or potential bidder is known, the target may acquire a company in a competing or related industry and seek protection under the antitrust laws." FLEISCHER, *supra* note 154, at 28-33.

162. ADVISORY COMMITTEE REPORT, *supra* note 6, at 34-46.

163. *Id.* at 37.



it is under pressured circumstances.<sup>164</sup>

The business judgment rule and the principles of fiduciary duty, as interpreted by the state judiciary, also provide protection to shareholders against abusive defense techniques. The general rule is that directors may reject a takeover bid if they act on a reasonable basis and in good faith.<sup>165</sup> Courts, in general, have supported the target directors' right to reject a tender offer because of inadequacy of price,<sup>166</sup> illegality of the offer,<sup>167</sup> illegality of the acquisition of control of the target by the raider,<sup>168</sup> and concern with the effect of the takeover on the employees of the target and the surrounding community.<sup>169</sup> Moreover, there are statistics indicating that of the thirty-six unsolicited tender offers that were rejected and defeated by target management between December 1973 and June 1979, in more than fifty percent of the cases as of August 1979, the shareholders were better off than if the tender offer had been successful.<sup>170</sup> State regulation of target defense ploys, therefore, tempered by the business judgment rule and the principles of fiduciary duty, would appear to benefit resident shareholders and corporations. As a result of the *MITE* decision, however, any state sanction of corporate defense ploys erected under the guise of the business judgment rule or fiduciary duty must be able to survive a judicial determination that the action does not constitute an undue burden on interstate commerce.

164. *Id.*

165. *See, e.g.*, *Anaconda Co. v. Crane Co.*, 411 F. Supp. 1210, 1215 (S.D.N.Y. 1975) (businessman, exercising proper business judgment, allowed to reject tender offer); *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969) (management, in its best judgment, responsible to oppose offers detrimental to company or shareholders).

166. *See, e.g.*, *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 356 F. Supp. 1066 (S.D.N.Y.) (target management of A & P found offer price inadequate), *aff'd*, 476 F.2d 687 (2d Cir. 1973).

167. *See, e.g.*, *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310, 1318-23 (W.D. Mich. 1978) (target management's "legitimate concerns" about raider's potential violations of securities laws proper exercise of fiduciary duty).

168. *Humana, Inc. v. American Medicorp, Inc.*, [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,286, at 92,823-34 (S.D.N.Y. Jan. 5, 1978) (offer raised antitrust questions).

169. *Herald Co. v. Seawell*, 472 F.2d 1081, 1096-97 (10th Cir. 1972) (directors of newspaper justified in averting a takeover having adverse impact on the character and quality of the newspaper and leading to poor relations with employees).

170. In January 1977, Viacom rejected a \$20 takeover bid, reflecting a premium of 95 percent over the then market price of \$10.25, by Storer Broadcasting; at the end of November 1980, Viacom was at \$57.25.

In October 1978, Freeport Minerals purchased for \$14.00, reflecting a premium of 19 percent over the then market price of \$11.78, about 10 percent of its shares from Denison Mines, which had accumulated the shares through market purchases; at the end of November 1980, Freeport Minerals was at \$61.25.

Lipton, *supra* note 6, at 1025.

## VI. CONCLUSION

The tender offer process has been regulated by both state and federal governments since 1968. During this concurrent regulatory period, states assumed extraterritorial jurisdiction under the auspices of protecting local interests and governing internal affairs of domestic corporations. Although the effect of these state regulations conflicted with the policy supporting the Williams Act, the courts allowed this regulatory morass until the Supreme Court's decision in *MITE*, holding that the Illinois State Takeover Statute was an unconstitutional burden on interstate commerce.

Despite the current trend toward federal deregulation,<sup>171</sup> and because of the exigency of judicial economy, Congress should preempt state regulation of bidder activity except when tender offers involve local companies only. Concomitantly, state regulation of domestic corporations should take a fiduciary approach that will promote legitimate local interests and protect investors. Whether this scheme of uniform federal regulation of bidder activity and state regulation of target defense ploys will balance the interests on both sides and protect the shareholder in the middle remains uncertain. The achievement of such a balance will depend upon the creation of an efficient marketplace wherein a shareholder may rely upon the comprehensive business judgment of his company's management.

*Robin Antoinette Rainey*

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171. McCauliff, *supra* note 133, at 296 n.7 ("deregulation of airline fares and trucking rates, together with careful congressional scrutiny of the Federal Trade Commission and a pending bill to deregulate rail fares, exemplify the recent trend toward deregulation").